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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

In the matter of the Adoption of:
LAURA GAIL RACHEL CLEM,
A Minor Child

LAWRENCE T. NEWMAN and BEVERLY R. NEWMAN,
Petitioners

vs.

THE WORCESTER COUNTY DEPARTMENT
OF SOCIAL SERVICES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF INDIANA

PETITION FOR WRIT OF CERTIORARI

LAWRENCE T. NEWMAN
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Appearing pro se

7 HP

QUESTIONS PRESENTED

1. Did the actions of the Indiana trial court judge against the Newmans give rise to an appearance of bias and prejudice sufficient to violate the Due Process Clause and require his recusal?

2. In dismissing the Newmans' petition to adopt Laura Clem, did the Indiana trial court judge have an interest in the outcome of the case for the purpose of vindicating his prior order to remove Laura Clem from the custody of the Newmans, such that he acted as a "judge in his own case", thus violating the due process rights of the Newmans?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding below:

Lawrence T. Newman and Beverly R. Newman,
Petitioners Below

The Worcester County Department of Social Services,
Respondent Below

Laura Gail Rachel Clem,
Real Party in Interest

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Lawrence and Beverly Newman, the prospective adoptive parents of the minor child Laura Gail Rachel Clem ("Laura Clem" or "Laura"), respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals of Indiana affirming the decision of the Marion County Superior Court, Probate Division, dismissing the Newmans' adoption petition of Laura Clem.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals issued on May 19, 1995, is set forth in Appendix A. The related opinion of the Indiana Court of Appeals denying rehearing is set forth in Appendix B. The opinion of the Indiana Supreme Court denying transfer is set forth in Appendix C. The order of the Marion County Superior Court in the adoption case is set forth in Appendix D. The order of the Marion County Superior Court in the full faith and credit case is set forth in Appendix E.

JURISDICTION

This case arises out of a companion case in which the Worcester County Department of Social Services ("Worcester County DSS"), Respondent below, obtained a court order from the Worcester County Circuit Court in the State of Maryland, ordering the return of custody of Laura Clem from Lawrence and Beverly Newman, Petitioners below. Laura Clem

had been placed with the Newmans in the State of Indiana for the purposes of adoption by her guardian, the Worcester County DSS, a Maryland State governmental agency, pursuant to the Interstate Compact for the Placement of Children. The Worcester County DSS presented the Maryland removal order to the Marion County Superior Court, Probate Division, an Indiana State court, requesting that the State of Indiana grant full faith and credit to the Maryland court order. During the pendency of the full faith and credit proceedings, and as a direct result of the actions taken by the Worcester County DSS in those proceedings, the Newmans filed a petition for adoption of Laura Clem in a separate action in the Marion Superior Court, Probate Division, which action is the subject of the proceedings below.

During the pendency of the adoption proceedings, on May 19, 1994, the Newmans filed a Verified Request for Change of Judge in the Indiana Trial Court, alleging bias and prejudice by the judge, Judge Charles J. Deiter, in the full faith and credit proceedings, which Request was denied by said Court on May 20, 1994 (R.23-24; R.28). Subsequent to the denial of the Newmans' Verified Request for Change of Judge, Judge Deiter took further actions in the full faith and credit proceedings against the Newmans, which further established his bias and prejudice against the Newmans. Judge Deiter failed to recuse himself sua sponte in the adoption proceedings.

The Newmans raised the issue of Judge Deiter's failure to recuse himself in their Motion to Correct Errors, filed with the Marion County Superior Court on July 7, 1994 (R.68).

The Newmans raised the issue in the Indiana Court of Appeals that the failure of Judge Deiter to recuse himself pursuant to the Verified Request for Change of Judge or sua sponte was a denial of due process. The Indiana Court of Appeals refused to consider the issue of whether the failure of a trial court judge to recuse himself sua sponte, when he is biased and prejudiced against a party, results in the denial of due process.

Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. § 1251(B)(3), and under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the following Constitutional provision, the pertinent portion of which is set forth below:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;...

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This case arises out of an interstate adoptive placement. On March 29, 1993, 3 1/2-year-old Laura Clem, along with her twin 7 1/2-year-old brothers, were placed in the home of Lawrence and Beverly Newman,

in Indianapolis, Indiana, for the purpose of adoption. The Clem children are Jewish, as are the Newmans. The placement was made pursuant to the Interstate Compact for the Placement of Children by the Worcester County Department of Social Services, a Maryland State agency, which had been granted guardianship over the children with the right to consent to adoption.

The Clem children had been living in the foster house of John and Mary Eubanks for almost two years prior to their placement with the Newmans. The Eubanks house had been licensed for 12 years by the Worcester County DSS, and dozens of foster children had been placed there over the years. The Eubanks house was a hazardous, ramshackle farm house, without central heat, and had only 2 bedrooms for the 5 adults and 5 or more special-needs children housed there. One of the adults residing in the foster house, John Eubanks, Jr., was a convicted violent criminal. John Eubanks, Jr., was well known by local Maryland social service authorities to be a chronic and dangerous felon. There had been years of reports by neighbors to the Worcester County DSS against the Eubanks foster family and house.

Shortly after the placement, the Newmans discovered that the boys displayed severe dysfunctionalities, violence, and sexual aggressiveness, of which the Newmans had never been apprised by the Worcester County DSS. The boys were witnessed molesting their little sister, other children, and each other, by at least 4 separate persons . Within 8 1/2 months after placement, the Newmans had returned both of the brothers to Maryland. One of the brothers was immediately committed to a

psychiatric hospital for sexually-abused children, where he remained for over 2 years. The Newmans repeatedly reported, orally and in writing, the Eubanks foster family to the Worcester County DSS for investigation of molesting the Clem children, but the Worcester County DSS refused to even initiate an investigation, in violation of state and federal law.

On December 7, 1993, the Newmans requested that the Worcester County DSS consent to their adoption of Laura Clem. Instead, the Worcester County DSS applied secretly for an order from the Worcester County, Maryland, Circuit Court, ordering the return of Laura Clem to Maryland. This was done in retaliation for the Newmans' public exposure of the crimes committed in the Eubanks foster house. The Worcester County DSS filed a Motion for Change of Placement on March 21, 1994. The Newmans were intentionally given no notice or opportunity to be heard with respect to the Motion. The Worcester County Circuit Court issued its order the next day, on March 22, 1994. Without holding a hearing, taking evidence, or hearing witnesses, the Worcester County Circuit Court ordered Laura Clem to be returned to the misery of foster care in Maryland.

Immediately upon receipt of the Maryland court order, the plan for the return of Laura to Maryland was put into effect. A Petition to Enforce Foreign Order for Change of Placement was filed by the Worcester County DSS in Indiana with the Marion Superior Court, Probate Division, Judge Charles Deiter. The Petition, filed on March 24, 1994, falsely claimed that an "emergency" was present, which required the immediate setting of a hearing. The nature of this "emergency" was never even alleged, let alone

established, because no emergency existed. Laura was safe and secure in her adoptive home with the Newmans. But Judge Deiter obliged the Worcester County DSS, and set a hearing on the Petition for 5 days hence, on Tuesday, March 29, 1994. Under ordinary circumstances, this precipitous action of Judge Deiter would have provided adoptive parents, up until that time totally unaware of the legal machinery set into motion against them, with precious little time to obtain legal counsel and adequately prepare for a hearing which could destroy their family forever. But in this case, the Worcester County DSS had purposely timed the first notice to the Newmans of the legal actions against them to coincide with their three religious Jewish Holy Days. The notes of social worker Trish Riedl reveal that as far back as March 14, 1994, the Worcester County DSS specifically planned that the Newmans would be first notified of its action to remove Laura from their care on March 25, 1994, because the Worcester County DSS knew that the Newmans would be prevented from adequately preparing for the hearing on the Jewish Holy Days.

The Newmans first received notice during the afternoon of Friday, March 25, 1994, that the Worcester County DSS had obtained the Maryland court order for the return of Laura Clem and that the hearing had been set on March 29, 1994, for enforcement of that order in Indiana. The Newmans' Sabbath, followed immediately by the first two Holy Days of Passover, began at sunset on Friday, March 25, 1994, and would not end until sundown on Monday, March 28, 1994. During their Jewish Sabbath and Passover Holy Days, the Newmans were prohibited by their religion from doing any work, using the telephone, traveling, spending money, etc. This fact was well known by the Worcester County DSS.

Therefore, the Newmans actually had less than one day to prepare for the March 29, 1994, hearing, to obtain an attorney, and for the attorney to properly prepare for the hearing.

The Newmans were unable to hire an attorney before the March 29, 1994, hearing in Indianapolis, because of their religious restrictions. Even if the Newmans had been able to hire an attorney on such short notice, the attorney would never have been able to get adequately prepared for the full faith and credit hearing in such a short period of time. The Newmans filed a Motion for Continuance on March 28, 1994, and explained to Judge Deiter prior to the hearing how their Jewish religious convictions had prohibited them from obtaining an attorney and preparing for the hearing. But Judge Deiter refused to grant a continuance, and the Newmans were forced to proceed, pro se and ill-prepared, at the March 29, 1994, full faith and credit hearing. Mr. Newman, a licensed attorney practicing in the area of taxes and pensions, had no training or experience in this area of the law, and Mrs. Newman had no legal background whatsoever.

A full hearing ensued, at which the Worcester County DSS had two witnesses testify, and introduced numerous documents into evidence, heretofore unknown and unseen by the Newmans. The Newmans had no witnesses testify, and had no documents to introduce. A full record was made of the hearing.

At the conclusion of the hearing, Judge Deiter required the parties to file written legal arguments on the issue of whether he should grant full faith and

credit to the Maryland court order. During the next six weeks, the parties filed several briefs and reply briefs.

On March 30, 1994, the day following the trial court hearing, Lawrence Newman travelled nearly 1,000 miles to Worcester County, Maryland, in order to obtain copies of the documents which had been filed with the Worcester County Circuit Court by the Worcester County DSS in support of its Motion for Change of Placement. The documents were necessary in order for the Newmans to adequately prepare their legal arguments for the Marion Superior Court on the issue of full faith and credit. The Worcester County Circuit Court refused to release the documents to Mr. Newman, claiming that the file was confidential. The Worcester County DSS refused to provide the Newmans with copies of the documents. Therefore, on April 7, 1994, the Newmans served discovery requests on the Worcester County DSS in order to obtain the documents, and filed another motion for continuance with Judge Deiter, requesting that he continue the time when legal briefs were due until a reasonable time after the Newmans had obtained the documents which had been filed in the Maryland Circuit Court. On the same day, April 7, 1994, Judge Deiter denied the motion for continuance. The Worcester County DSS never complied with the Newmans' discovery request, and the Newmans never have seen the documents filed by the Worcester County DSS with the Worcester County Circuit Court to obtain the order for Laura's return to Maryland.

On April 13, 1994, while the decision by Judge Deiter on whether or not to grant full faith and credit to the Maryland removal order was still pending, the Newmans filed a petition to adopt Laura Clem with

Judge Deiter's court. The adoption case was filed on a separate docket than the full faith and credit case. On April 22, 1994, the Worcester County DSS filed a motion to contest the adoption of Laura by the Newmans.

On May 12, 1994, Judge Deiter issued an Order to Enforce Foreign Order for Change of Placement, granting full faith and credit to the Maryland court order. He ordered that the Newmans return custody of Laura to the Worcester County DSS by no later than May 20, 1994. On the same date, May 12, 1994, Judge Deiter set the motion to contest adoption for trial on June 6, 1994. What was Judge Deiter's motivation in setting Laura's adoption for trial, and at the same time, ordering Laura to be returned to Maryland 2 weeks before the adoption trial? Were the Newmans to be successful in their adoption of Laura, it would result in the cruel anomaly of Laura being forcibly removed from their custody, returned to foster care in Maryland, and then returned again to the permanent custody of the Newmans barely 2 weeks later. Even if the Newmans were to be unsuccessful in their adoption of Laura, Indiana statute requires that even after an adoption petition is dismissed, "If the court dismisses the petition, the court shall determine the person who should have custody of the child." I.C.31-3-1-8(e). By ordering that Laura be physically returned to the State of Maryland prior to the adoption hearing, Judge Deiter determined that he had decided the custody of Laura before the adoption trial ever took place.

On the same day, May 12, 1994, the Worcester County DSS filed a motion to modify restraining order, so that it could subpoena 4-year-old Laura Clem to

appear in Maryland at an administrative hearing on May 16, 1994, on the Jewish Holy Day of Shavuous. Although he had been notified at length in writing by the Newmans about the fact that the administrative hearing had been set illegally, and that their religious practice prohibited the Newmans from participating in a hearing on their Jewish Holy Days, Judge Deiter immediately issued an order on the same day, May 12, 1994, to lift the restraining order.

On May 16, 1994, the Newmans filed a Request for Stay of Orders of May 12, 1994. This was denied by Judge Deiter on the same day as filing. On May 18, 1994, the Newmans filed a Motion to Vacate Order to Enforce Foreign Order for Change of Placement. This was denied by Judge Deiter on the same day as filing. On May 18, 1994, the Newmans filed a Further Notification and Verification of Child Endangerment by Court Actions to Deport Laura Clem. No action was ever taken by Judge Deiter on this pleading.

On May 19, 1994, the Newmans filed a Verified Request for Change of Judge in the adoption case, requesting that Judge Deiter recuse himself due to the bias and prejudice he had demonstrated against the Newmans in the full faith and credit case. The next day, on May 20, 1994, Judge Deiter denied the Newmans' Verified Request for Change of Judge.

The Newmans filed a Verified Emergency Petition To Stay Execution Of Probate Court Order, Without Notice, Pending Appeal, with the Indiana Court of Appeals on May 19, 1994. A temporary stay was granted by the Indiana Court of Appeals on May 19, 1994, with a full hearing on a permanent stay scheduled for May 25, 1994. Thirty minutes after

hearing oral argument on May 25, 1994, the Indiana Court of Appeals dissolved the stay. On May 25, 1994, immediately after the Indiana Court of Appeals dissolved its stay of his May 12, 1994, removal order, Judge Deiter issued a Supplemental Order to Enforce Foreign Order for Change of Placement, ordering the Newmans to return custody of Laura Clem to the Worcester County DSS no later than 2:00 PM on Thursday, May 26, 1994.

The Newmans immediately thereafter filed for transfer to the Indiana Supreme Court requesting a stay of the Indiana Trial Court's order to remove Laura. The Indiana Supreme Court denied transfer on May 26, 1994. On May 26, 1994, Judge Deiter issued an amended supplemental order, requiring the Newmans to return custody of Laura Clem to the Worcester County DSS at the office of The Children's Bureau of Indianapolis, at 2:00 PM on Friday, May 27, 1994. On the same date, Judge Deiter issued an order resetting the date of the hearing regarding the Newmans' adoption petition from June 6, 1994, to June 2, 1994. Judge Deiter was now ordering Laura Clem to be returned to Maryland a mere 6 days before her adoption trial was to begin in Indiana.

On May 27, 1994, the Newmans filed a Verified Motion for Temporary Restraining Order and associated pleadings with the Federal District Court, Southern District of Indiana. The District Court did not set the hearing on the Newmans' Motion until 4:00 PM on May 27, 1994. The District Court denied the Newmans' Motion at approximately 5:30 PM on Friday, May 27, 1994.

The Newmans became aware of the Federal

District Court's action at approximately 6:00 PM on May 27, 1994. Since the offices of The Children's Bureau had already closed, and their Jewish Sabbath was swiftly approaching, the Newmans waited at home, fully expecting the Marion County Sheriff to come to their home to enforce Judge Deiter's order for Laura's removal. The Newmans were fully prepared to comply with Judge Deiter's removal order, and instructed their attorney to turn Laura over to the Sheriff upon the Sheriff's request.

Unknown to the Newmans, Judge Deiter began issuing a number of secret orders, which were never served upon the Newmans or their attorney. At 5:50 PM on May 27, 1994, Judge Deiter issue a Writ of Assistance to the Marion County Sheriff, directing that:

> IT IS FURTHER ORDERED that you are COMMANDED to use any and all force necessary, including incarceration, to obtain said child from said residence....It is further ordered that, where appropriate, the sheriff is authorized to arrest any person and bring him or her to this Court to show cause why he or she should not be punished for contempt, and to hold such person until Court is in session [5 days later, due to Memorial Day weekend].

On the same date, May 27, 1994, Judge Deiter issued an Order to Appear, which was never served upon the Newmans or their attorney, stating:

> BEVERLY R. NEWMAN is ordered to appear in this court at room 1721 City-County Building, Indianapolis, Indiana, immediately and show cause why she has failed to comply with this

Court's orders.

On the same date, May 27, 1994, Judge Deiter issued an Order to Arrest Beverly R. Newman, which was never served upon the Newmans or their attorney, stating:

> The Marion County Sheriff is ordered to immediately arrest Beverly R. Newman and produce her in this Court to show cause why she is not in contempt of this Court.

Although the Newmans were fully prepared to comply with Judge Deiter's order to return Laura Clem to the custody of the Worcester County DSS, upon the denial of their application to the District Court, no one from the Worcester County DSS, the Sheriff's Department, or Judge Deiter's court contacted them to effect Laura's transfer. Instead, Judge Deiter concocted and conducted a criminal conspiracy to lure the Newmans to his office, so that the Newmans could be held hostage there while Laura was seized from their home.

Although Judge Deiter had signed the Writ of Assistance at 5:50 PM, and sheriffs had been in the Newmans' neighborhood since that afternoon, no one from the Sheriff's Department came to the Newmans' home until 10:00 PM on Friday, May 27, 1994, after dark and after the Newmans' Sabbath had begun. At that time, sheriff's attorney, Chris Seigel, arrived at the Newman home with a sheriff's deputy. Seigel and the deputy were immediately let into the Newman home by the Newmans' attorney. Seigel then proceeded to put Judge Deiter's set-up of the Newmans into effect.

Seigel claimed that he had no papers with him directing him to take Laura, and that he had only come to talk. After talking with the Newmans for about 45 minutes, Seigel said that there must be much more to the case than had been allowed to be presented to the Indiana Trial Court, and Seigel suggested that he could telephone Judge Deiter to arrange for an "emergency best interests hearing" for Laura. When Seigel called Judge Deiter at his office at approximately 11:00 PM, the Newmans' attorney was also on the line, and he obtained Judge Deiter's oral commitment that if the Newmans went to meet with Judge Deiter, and were unsuccessful in changing his mind, no action would be taken to remove Laura until the Newmans returned home. After obtaining Judge Deiter's verbal stay of his removal order, the Newmans went to Judge Deiter's court.

The Newmans arrived at Judge Deiter's court at approximately 11:45 PM on Friday, May 27, 1994. Although the Newmans had been told that Judge Deiter would be holding an "emergency best interests hearing" for Laura, none of the requirements for a legal court hearing were present. The Newmans met with Judge Deiter in his office, not in the courtroom. Judge Deiter was not wearing his judicial robe. No representative of the Worcester County DSS was present. No record was made of the proceeding. Outside and inside of Judge Deiter's office, many armed sheriff's deputies were stationed.

During the course of the meeting with Judge Deiter, the Newmans explained to him that they were permitted by their religious convictions to disrupt their Sabbath in order to save a life, and that they were meeting with him in order to save Laura Clem's life. As

they talked, Judge Deiter made note that the Newmans would not attend the Maryland administrative hearing on their Jewish Holy Day of Shavuous, and he proceeded to make derogatory remarks about the Newmans' religious beliefs and practices. Beverly Newman explained to Judge Deiter that she was being forced into a position of either violating man's laws, or violating G-d's laws, if she were forced to turn Laura Clem over to the Worcester County DSS, which had a documented history of endangering and abusing foster children in its custody, and in particular, Laura Clem. Judge Deiter conceded that if the Newmans were to prevail at the adoption hearing scheduled for 4 days later, they would be allowed to adopt Laura Clem, but gave no answer when asked why he was nonetheless insisting that Laura Clem be immediately sent back to Maryland foster care.

Nevertheless, after speaking to the Newmans for about 40 minutes, Judge Deiter announced that he "will not relent," and he told the Newmans that they were being held in his office while he sent sheriffs to their home to take Laura. Judge Deiter ordered two armed sheriffs to guard the doorway to his office to prevent the Newmans from trying to leave. Other armed sheriffs guarded the outer doorways to the Judge's offices. The Newmans were never placed under arrest. Judge Deiter never held a contempt hearing, nor were the Newmans ever found in contempt of court.

The Newmans were illegally held hostage by Judge Deiter against their will for a period of 40 minutes. Members of the media had accompanied the Newmans to the building where Judge Deiter's office is located, but when the Newmans requested to be

allowed downstairs to speak to the media, even in the company of the sheriffs, Judge Deiter refused to permit the Newmans to speak to anyone. Only after Judge Deiter was advised that Laura Clem had been seized from the Newman home, at 1:10 AM on Saturday, May 28, 1994, did Judge Deiter release the Newmans from their false imprisonment in his office. Laura was immediately transported back into foster care in the State of Maryland, where she remains to this day, forced to live with one of her brothers who molests her.

From June 2-4, 1994, the hearing was held on the Worcester County DSS's motion to contest the Newmans' adoption of Laura Clem. The hearing was held before Judge Deiter. The Newmans had subpoenaed Laura Clem to appear and testify, but Judge Deiter quashed the subpoena prior to the hearing. Since Laura Clem had been removed from their custody by action of Judge Deiter 5 days previously, the Newmans had no further way to compel Laura Clem's attendance. The Newmans were forced to testify concerning the illegal actions and events of May 27-28, 1994, before Judge Deiter, who had himself been the primary force behind the set-up of the Newmans. Based upon the aforementioned actions of Judge Deiter, establishing his extreme bias and prejudice against the Newmans, Judge Deiter was required to recuse himself sua sponte from the adoption proceedings, which he failed to do. On June 7, 1994, Judge Deiter issued an order dismissing the Newmans' petition to adopt Laura Clem.

The Newmans timely pursued the appeal which is the subject of these proceedings. On May 19, 1995, the Indiana Court of Appeals affirmed the judgment of the Marion Superior Court. The Indiana Court of

Appeals refused to consider the issue of whether the failure of a trial court judge to recuse himself sua sponte when he is biased and prejudiced against a party results in the denial of due process. On November 29, 1995, the Indiana Supreme Court denied transfer.

REASONS FOR GRANTING THE WRIT

I. The issue of whether allegations of bias and prejudice against a State court judge are sufficient under the Due Process Clause to require recusal needs to be decided.

Certiorari should be granted to determine the issue left unanswered in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). In *Aetna*, this Court declined to decide whether allegations of personal bias or prejudice by a state court judge would ever be sufficient under the Due Process Clause to force recusal. The magnitude and severity of the bias and prejudice displayed by Judge Deiter in this case, combined with the failure of both the Indiana Court of Appeals and the Indiana Supreme Court to even consider this vital issue, compel a determination by this Court of this critical undecided question.

Required judicial recusal for bias did not exist in England at the time of Blackstone. 3 W. Blackstone, Commentaries 361. Since 1792, federal statutes have compelled district judges to recuse themselves for various reasons, and beginning in 1911, federal laws have expanded the bases for recusal to include bias and prejudice in general. *Liteky v. U.S.*, __ U.S.__, 114 S.Ct. 1147, 1151 (1994). The federal statutes are

codified in 28 U.S.C. §144 and in 28 U.S.C. §455(a). State statutes also set parameters for the recusal of judges in state courts. C.F. IND.CODE §35-36-5-2(1) (providing for change of judge in a criminal proceeding.) The ABA Code of Judicial Conduct, Canon 3C(1)(a) (1980), states that "A judge should disqualify himself...where he has a personal bias or prejudice concerning a party." Indiana Judicial Conduct Canon 3E(1)(a) states, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including ... where the judge has a personal bias or prejudice concerning a party...."

This Court has recognized that not all questions of judicial qualification involve Constitutional validity, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Most matters relating to judicial disqualification do not rise to a Constitutional level. *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). A decision of a state to regulate procedures under which its laws are carried out is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Patterson v. New York*, 432 U.S. 197, 201-202 (1977). However, this Court has recognized that recusal of a State court judge, based solely upon allegations of personal bias or prejudice of the judge, could be Constitutionally required in the most extreme cases. *Aetna Life Insurance v. Lavoie*, 475 U.S. 813, 821 (1985). This is such a case.

Indiana recognizes that the reasoning behind the analyses of the federal recusal statutes has applicability to Indiana state recusal determinations. *Crawford v. State* (1994), Ind.App., 634 N.E.2d 86, 87

(recognizing that the holding in *Liteky v. U.S.*, __ U.S. __, 114 S.Ct. 1147 had application to the case and was helpful to the court's analysis of an Indiana recusal statute).

The key to the analysis in this case is that actual bias or prejudice of Judge Deiter need not be established in order to mandate a finding that the Newmans' due process rights were violated by Judge Deiter's failure to recuse himself. The mere appearance of bias or prejudice can necessitate the recusal of a trial judge.

> The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.' *Aetna Life Insurance v. Lavoie*, 475 U.S. 813, 825 (1985), quoting *In re Murchison*, 349 U.S. 133, 136 (1955).

If there is an appearance of partiality, that ends the matter. *U.S. v. Antar*, 53 F.3d 568 (3rd Cir. 1995).

The parameters for applying the "appearance of bias or prejudice" test are set forth in the cases discussing the applicability of 28 U.S.C. § 455. While the instant case does not concern the federal statute, *Aetna Life Insurance v. Lavoie*, *supra,* makes it clear that the test must nonetheless apply to a state court case. (Indiana Judicial Conduct Canon 3E(1)(a) likewise implicates the test for Indiana trial judges, as it provides that a judge must disqualify himself in a proceeding in which the judge's impartiality might

reasonably be questioned.)

Justice must satisfy the appearance of justice. *Offut v. United States*, 348 U.S. 11, 14 (1954). A reasonable man standard is used in determining whether a judge should recuse himself. *Wilkinson v. D.M. Weatherly Co.*, 655 F.2d 46 (1981). "[W]e must determine whether a reasonable person, knowing all the acknowledged circumstances, might question the district judge's continued impartiality." *In re School Asbestos Litigation* , 977 F.2d 764, 781 (3rd Cir. 1992). "The problem, however, is that regardless of [the judge's] actual impartiality, a reasonable person might perceive bias to exist, and this cannot be permitted." *Id.* at 82. A person must be guaranteed a "totally fair and impartial tribunal" and the "integrity and dignity of the judicial process from any hint or appearance of bias" must be protected. *United States v. Columbia Broadcasting System, Inc.* , 497 F.2d 107, 109 (1974). "[T]ribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial..." *Berger v. United States*, 255 U.S. 22, 35-36 (1921). "When the judge joins sides, the public as well as the litigants become overawed, frightened and confused." *Reserve Mining Co. v. Lord* , 529 F.2d 181, 186 (8th Cir. 1976). The need for public confidence in the judiciary compels recusal even in cases where the judge was not actually aware of the facts which might cause the public to question his partiality. Recusal is required even if the judge did not actually know of the facts creating an appearance of impropriety, so long as the public might reasonably believe that he knew. *Liljeberg v. Health Services Acquisition Corp.* , 486 U.S.847, 860-861 (1987).

The actions of Judge Deiter against the Newmans throughout the full faith and credit case displayed just the sort of bias and prejudice that requires recusal, and created an appearance of impropriety so overt that public confidence in his court remains shaken. From the inception of the case, he showed a clear favoritism toward the Worcester County DSS. Judge Deiter set the initial hearing for March 29, 1994, knowing that the Newmans (as opposed to the Worcester County DSS) would only have a few days to prepare for the hearing. The short notice was done at the behest of the Worcester County DSS, which claimed that an "emergency" was present, yet never was called upon by Judge Deiter to explain the nature of the alleged "emergency," either before the setting of the hearing or during the hearing itself. Judge Deiter witnessed Laura Clem in his courtroom on March 29, 1994, in excellent health and appearance, demonstrating the falsity of an "emergency" and the fraud by the Worcester County DSS on his court.

Even after Judge Deiter was informed by the Newmans of their inability to hire an attorney for and to properly prepare for the March 29, 1994, hearing, due to the short time frame imposed by Judge Deiter and the Newmans' religious convictions, both through a written motion for continuance and orally prior to the hearing, he refused to grant a continuance and insisted upon going forward with the hearing and making a record, at the expense of the unrepresented, inexperienced, and ill-prepared Newmans.

Judge Deiter refused to grant the Newmans a continuance in order for them to obtain the documents

which the Worcester County DSS had filed with the Worcester County Circuit Court. His refusal to permit the Newmans the time to access these documents put the Worcester County DSS into a superior position in preparing its arguments before Judge Deiter. The Worcester County DSS knew what documents it had filed in the Worcester County Circuit Court to obtain the removal order, and had full access to those documents at its inclination. The Newmans were forced to operate with critical handicaps and in ignorance.

Judge Deiter issued his Order to Enforce Foreign Order for Change of Placement, granting full faith and credit to the Maryland removal order, and ordering the return of Laura Clem to Maryland, on the same day that he set her adoption trial date. Judge Deiter ordered that Laura be returned to Maryland by May 19, 1994, and set her adoption trial for June 6, 1994, barely 2 weeks later. No clearer sign of Judge Deiter's bias against the Newmans' opportunity to adopt Laura could be evidenced. Judge Deiter had prejudged the adoption case, and was sending Laura away before the adoption trial even took place. Subsequent events exacerbated the impression of Judge Deiter's bias. After various stays had been issued, and the date of the adoption trial moved up, only 5 days separated the date of Laura's removal from the Newmans' custody, and the Newmans' adoption trial. No impartial judge would send a child away from her adoptive family, consigning her to foster care hundreds of miles away and traumatizing her forever, with the expectation that she might be adopted by the family only 5 days hence. Further, Judge Deiter knew that sending Laura back to Maryland, and out of jurisdiction, would force the Newmans into protracted and wholly unnecessary legal proceedings in

Maryland to enforce an Indiana adoption order. Judge Deiter's actions only made sense if Judge Deiter had no intention of ever permitting the Newmans to adopt Laura Clem. Nonetheless, when the Newmans filed their Verified Request for Change of Judge on May 19, 1994, Judge Deiter immediately denied it. By refusing to recuse himself, Judge Deiter made certain that he personally would control Laura's fate and would be able to take violent actions against the Newmans.

Most egregious of all were the steps taken by Judge Deiter on the night of May 27-28, 1994. He issued numerous secret and violent orders, which were never served upon the Newmans or their attorneys. He masterminded a criminal conspiracy to lure the Newmans from their home to his office in the middle of the night, so that they could be held hostage under armed sheriffs' guard while Laura was being seized from their home. He held the Newmans prisoner in his office for 40 minutes, without any legal cause or justification, in order to achieve his ends. No contempt citation was ever served upon the Newmans, nor was any contempt proceeding ever held. The Newmans were never found in contempt of court. Yet the Newmans were literally kidnapped by Judge Deiter in his zeal to dispatch Laura Clem out of state before the adoption trial would be held.

Only 5 days later, the Newmans were before Judge Deiter again, asking him to approve their adoption of Laura. Judge Deiter displayed his utter contempt for the bonding and the parent-child relationship that had developed between the Newmans and Laura. Judge Deiter assured that he would never have to see Laura and the Newmans together in his courtroom, and quashed the Newmans'

subpoena of Laura, which was required because she was now out-of-state, to drive home the point. What fair-minded member of the public would not question Judge Deiter's intentions toward the Newmans, and view Judge Deiter's conduct as clearly evidencing his aversion and hostility towards and virulent prejudice against the Newmans?

Judge Deiter also violated the religious rights of the Newmans throughout the proceedings. He refused to continue the March 29, 1994, hearing, even after being informed that the Newmans' religious convictions prohibited them from being able to hire an attorney or prepare for the hearing during the 3 Jewish Holy Days which preceded the hearing. He lifted his restraining order, in order to aid the Worcester County DSS to force the Newmans to attend a hearing in Maryland on their Jewish Holy Day of Shavuous. He held the Newmans hostage in his office on their Sabbath. As stated by Beverly Newman, he was forcing the Newmans to either violate man's laws or to violate G-d's laws, in requiring them to turn Laura over to the Worcester County DSS, which had a long history of endangering and abusing the foster children under its control, and in particular, Laura Clem.

The importance of applying G-d's laws to the jurisprudence in this country cannot be understated. Public Law 97-280 states in pertinent part:

> Whereas the Bible, the Word of G-d, has made a unique contribution in shaping the United States as a distinctive and blessed nation and people;...
>
> Whereas that renewing our knowledge of and faith in G-d through Holy Scriptures can

strengthen us as a nation and a people: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled... in recognition of both the formative influence the Bible has been for our Nation, and our national need to study and apply the teachings of the Holy Scriptures.

The significance and impact of the Congressional and Presidential recognition that the Bible is the Word of G-d in Public Law 97-280 cannot be minimized.

> The boldness and aggressiveness of P.L. 97-280 cannot be ignored. It pronounces the Bible to be the "the Word of G-d" ... [recognizing]... our national need "to apply the teachings of the Holy Scriptures." P.L. 97-280 represents a Congressional pronouncement -- ... a pronouncement by the government of the United States -- that truth and virtue lie within the Bible and that falseness and evil lie without it. The implication is so powerful as hardly to be described as implication, that those who fail or refuse to accept and to apply Biblical teachings abide in falseness and evil. *Gaylor v. Reagan*, 553 F.Supp. 356 (1982).

A bolder statement by the government of the United States could not be made - truth and virtue lie within the Bible and falseness and evil lie without it, because the Bible is the Word of G-d, and every person must abide by and obey G-d's laws. Judge Deiter knowingly violated G-d's laws in sending Laura Clem to a life of misery and criminal endangerment in

Maryland foster care.

> The fatherless shall come and be satisfied.
> Deuteronomy 14:29.

> G-d standeth in the congregation of G-d;
> In the midst of the judges He judgeth:
> 'How long will ye judge unjustly,
> And respect the persons of the wicked?
> Judge the poor and fatherless;
> Do justice to the afflicted and destitute.
> Rescue the poor and needy;
> Deliver them out of the hand of the wicked....'
> Psalm 82.

The extrajudicial source rule, to the extent applicable, would have not change the result in this case. An "extrajudicial" source means a source outside of the judicial proceeding at hand, which would include as extrajudicial sources earlier judicial proceedings conducted by the same judge. *Liteky v. U.S.*, __ U.S.__, 114 S.Ct. 1147, 1152 (1994), citing *United States v. Grinnell Corp.* , 384 U.S. 563, 583 (1966). In the present case, the bias and prejudice of Judge Dieter, as discussed above, was displayed in the prior full faith and credit proceeding. Therefore, the extrajudicial source rule is clearly met.

To the extent that Judge Deiter displayed bias and prejudice in the instant adoption case, his actions meet the objective standards of the extrajudicial source rule. "Bias" and "prejudice" are applied only to judicial predispositions that go beyond what is normal and acceptable. *Liteky v. U.S.*, __ U.S.__, 114 S.Ct. 1147, 1155 (1994). Furthermore, the extrajudicial source rule as applied in *Liteky, Id.*, confirms the limits

of that rule. The grounds for establishing bias or prejudice asserted by the parties in *Liteky* were solely related to judicial rulings, routine trial administration efforts, and ordinary admonishments to counsel and to witnesses, which occurred in judicial proceedings. Such grounds must demonstrate that they were rooted in knowledge acquired outside the proceedings at hand, or displayed deep-seated and unequivocal antagonism that would render fair judgment impossible. *Liteky, Id.*, at 1158.

Judge Deiter's rulings in the instant adoption case meet the parameters described above. He intentionally and knowingly set the date of the adoption trial to occur after he had sent Laura Clem back to Maryland and out of jurisdiction in the prior full faith and credit case. He quashed the subpoena of Laura Clem, so that she could not be brought back into Indiana's jurisdiction, and so that he could not personally view again the close bonding between the Newmans. (In the prior full faith and credit case, Judge Deiter had actually insisted that Laura be removed from the courtroom at the beginning of the March 29, 1994, hearing.) Since the best interest of the child is paramount in any adoption proceeding, Judge Deiter's extreme antipathy toward having Laura present in his courtroom confirms his prejudgment of the case and antagonism against the Newmans. Judge Deiter's hostage-holding of the Newmans while Laura was being seized from their home was clearly outside the bounds of any legally-constituted judicial proceeding.

II. When a trial judge acts as a "judge in his own case" in order to vindicate his prior decisions, he violates due process rights.

An additional and separate ground establishing the basis for the recusal of Judge Deiter arises because in hearing the adoption case, Judge Deiter actually acted as a "judge in his own case", and thus violated the Newmans' due process rights. A judge who was part of an earlier process or proceeding, and who subsequently is not wholly disinterested in the determination of a later proceeding because of his decisions in the earlier proceeding, violates the due process rights of the parties. "No man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

In *In re Murchison*, 349 U.S. 133 (1954), the judge acted as a one-man grand jury in investigating criminal charges, and then presided over contempt proceedings with respect to witnesses in the grand jury proceeding. It was held that the same judge could not Constitutionally preside over the contempt proceedings after having personally conducted the one-man grand jury, and that doing so was a denial of due process. "Having been part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.*, at 137.

In *Aetna life Insurance Co. v. Lavoie*, 475 U.S. 813 (1985), a Justice of the Alabama Supreme Court participated in the decision on a case in which the issue was the alleged bad-faith refusal of an insurance company to pay a claim, and a request for punitive

damages. During the pendency of that case, the same Justice had personally filed 2 actions against insurance companies alleging bad-faith failure to pay claims and seeking punitive damages. This Court held that the Justice's Alabama Supreme Court opinion had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case. It was therefore held that, when he made his judgment in the case before him, the Justice had acted as "a judge in his own case." *Id.*, at 824.

Even if there is not actual bias or an appearance of partiality present, recusal is required if the judge has placed himself in a position in which he must decide an adversarial proceeding in favor of any one party to vindicate some prior action he has taken. *Frates v. Weinshienk*, 882 F.2d 1502 (10th Cir. 1989). In *Frates*, the issue was whether a bankruptcy judge, after presiding over the administrative portion of a bankruptcy case, could properly preside over the adversarial portions of the case. The court stated at 1504:

> [R]ecusal is necessary if there is evidence of actual bias, if the bankruptcy judge by words or actions reasonably appears to have prejudged adversarial proceedings over which he is to preside, or if the judge appears "boxed in" by prior rulings such that he will be forced to reach a certain result in an adversarial proceeding regardless of the merits.

The circumstances of the instant adoption case fall squarely within the parameters set forth in the above authorities. Judge Deiter did indeed prejudge the adoption case, and he certainly boxed himself in

by his prior rulings. Judge Deiter's single-minded insistence that Laura Clem be taken from her adoptive home and sent off to Maryland before the adoption trial ever took place left him with only one alternative. It would have been truly bizarre (and incredibly cruel to Laura) for Judge Deiter to have required Laura to be dispatched from her adoptive home, sent back into foster care hundreds of miles away, only to be returned several days later if the Newmans prevailed at the adoption trial. In order to vindicate his decision to remove Laura from the Newman home and give her to the Worcester County DSS, and to cover up his own criminal actions in said removal activities, Judge Deiter had already decided, and boxed himself in so that he had no other choice than, to turn down the Newmans' petition to adopt Laura Clem.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 23, 1996

APPENDIX A

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IN THE
COURT OF APPEALS OF INDIANA
FIFTH DISTRICT

IN THE MATTER OF THE ADOPTION OF:

L.C., A Minor Child

SHARPNACK, C. J.

Cause No 49A02-9409-CV-00548

650 N.E.2d 726 (Ind.App. 5 Dist. 1995)

APPEAL FROM THE MARiON SUPERIOR COURT
The Honorable Charles J. Deiter, Judge
Cause No. 49D08-9404-AD-126

May 19, 1995
OPINION
FOR PUBLICATION

Lawrence and Beverly Newman appeal the trial court's decision dismissing their petition for adoption of L.C. We affirm.

The Newmans raise eight issues for our review, which we consolidate and restate as:

1. whether the trial court erred in permitting the Worcester County Department of Social Services ("WCDSS") to withhold consent to adoption; 1

2. whether the trial court erred in determining that the adoption was not in L.C.'s best interests when a welfare report had not been filed with the trial court;

3. whether the trial court erred in determining that the adoption was not in L.C.'s best interests after determining that consent was not being unreasonably withheld by the WCDSS;

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1 We consolidate within our first issue the Newmans' first and eighth issues, which challenge the sufficiency of the evidence supporting the court's judgment.

4. whether the trial court erred in quashing the Newmans' subpoena of L.C. to testify at the adoption hearing;

5. whether the trial court erred by not appointing a guardian ad litem to represent L.C. at the adoption hearing;

6. whether the trial court erred in qualifying witnesses of the WCDSS as experts; and

7. whether the trial court erred in refusing to disqualify Judge Charles J. Deiter.

Facts

After many years of trying to adopt children, the Newmans were informed in February, 1993, that three children in Maryland were available for adoption. The three children were wards of the State of Maryland and were under the guardianship of the WCDSS. Their biological mother had been murdered and their biological father, who was incarcerated, had had his parental rights terminated. Two of the children, R.C. and M.C., were fraternal twin boys aged seven-and-one-half years at the time. The other child was a girl, L.C., aged three-and-one-half years at the time.

On March 1, 1993, the Newmans were interviewed at the WCDSS by Ann Turner, a caseworker. Turner informed the Newmans that the boys had been sexually abused when they were two-and-one-half years old, had learning disabilities, and required medication, and that it was the goal of the WCDSS to

keep the siblings together and to have any adoptive family maintain contact with the children's maternal grandmother. On March 23, 1993, the WCDSS entered into an Interstate Compact Placement Agreement with the Family Protection and Development Bureau of the Indiana State Division of Family and Children, providing that the Children's Bureau of Indianapolis, Inc., the agency chosen by the Newmans, would supervise the placement in Indiana. Patricia Reidl was assigned as the caseworker.

On March 29, 1993, the three children were placed in the Newmans' home. Over the next several weeks, problems with the children surfaced and it became apparent to the Newmans that the children's physical and developmental problems were worse than they had anticipated. All three children were severely undereducated; L.C. threw tantrums and displayed anti-social behavior; R.C.'s teeth were in poor condition and he could not speak intelligibly; M.C., who still needed to wear diapers at night, drenched his bed almost every night. Both boys displayed various inappropriate sexual acting-out behaviors, including the "mounting" of L.C. and other girls.

On September 19, 1993, the Newmans sent a letter to Turner requesting that M.C. be removed from their home because they felt that he posed a threat to his siblings. On September 24, 1993, M.C. was returned to Maryland by the WCDSS.

On December 3, 1993, the Newmans wrote to Reidl requesting that another placement be found for R.C. because of further problems with violent behavior and

sexual acting-out. On December 6, 1993, the Newmans wrote again to Reidl requesting that R.C. be removed from their home immediately. On December 13, 1993, Reidl picked R.C. up from the Newmans' home and brought him to the Family Support Center, a shelter. On Friday, December 18, 1993, Reidl put R.C. on a flight to Maryland, where he was placed in a foster home.

On December 15, 1993, the Newmans wrote to Turner to inform her that they wanted to adopt L.C. immediately. Concerned about the Newmans' parenting skills and methods of discipline, Turner met with L.C.'s court-appointed attorney and officials of the WCDSS to discuss L.C.'s placement with the Newmans. It was agreed that a psycho-social evaluation of L.C. and the Newmans was necessary to determine if the adoption should proceed.

On January 13, 1994, WCDSS faxed a letter to Reidl setting forth the requirements of the WCDSS to consent to the adoption. Reidl then met with the Newmans on that date to discuss the required evaluations. A copy of the WCDSS's letter to Reidl was received by the Newmans four or five days later. A series of conditions placed upon the evaluations by the Newmans prevented the evaluations from taking place, however. On January 24, 1994, the Newmans faxed a letter to Reidl requesting a copy of the original assessment stipulations from Maryland before going forward with the evaluations. A week later, the Newmans asked that they or a babysitter be permitted to sit in on L.C.'s evaluation, contending that L.C. could not be comfortable otherwise. The testing service did

not agree, and the Newmans then requested that L.C. be evaluated by a black female psychologist, because L.C. felt comfortable in the presence of black women. Agreement on a black female psychologist was not reached, however, and ultimately a hispanic female psychologist was found acceptable by the Newmans. Further objections to the evaluations were made, however, in letters to the WCDSS and the Children's Bureau of Indianapolis dated March 7, 1994, concerning the Newmans' access to the test results and alleging that the agencies had failed to investigate reports of child abuse and neglect made by the Newmans.

In March, 1994, the WCDSS obtained an order from the Circuit Court for Worcester County, Maryland, authorizing L.C.'s removal from the Newman home. On April 13, 1994, the Newmans filed a petition to adopt L.C. in the Marion County Superior Court, Probate Division. On April 22, 1994, the WCDSS filed its motion to contest adoption, and the matter was set for a hearing.

On May 12, 1994, the WCDSS obtained an order from the Marion County Superior Court giving the Maryland order full faith and credit and requiring the Newmans to transfer custody of L.C. to the WCDSS. 2 On May 19, 1994, the Newmans filed a verified request for change of judge, alleging that Judge Charles J. Deiter was biased and prejudiced against the Newmans. Judge Deiter denied the motion.

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2 The Newmans have filed a separate appeal of the order of the Marion County Superior Court granting full faith and credit to the Maryland order.

L.C. was removed from the Newman home in the early morning hours of May 28, 1994. On June 2
through 4, 1994, a hearing on the Newmans' petition to adopt was held. On June 7, 1994, the trial court issued its order dismissing the Newmans' petition and finding, inter alia, that the WCDSS had filed timely written reasons for withholding consent to adoption, that WCDSS is the court-appointed guardian of L.C. and has been empowered by the appointing court to consent to the adoption, that the WCDSS has not consented to the adoption, that the WCDSS was not unreasonably withholding its consent, that the adoption would not be in the best interests of L.C., and that dismissing the petition for adoption would be in the best interests of L.C.

The trial court entered its findings sua sponte. In such a case, the general judgment will control as to the issues upon which the court has not made findings and the specific findings control only as to the issues they cover. Blazek v. Blazek (1994), Ind.App., 631 N.E.2d 518, 520. We may affirm a general judgment on any theory supported by the evidence adduced at trial. In re Marriage of Snemis (1991), Ind.App., 575 N.E.2d 650, 652. We may not reverse the trial court's findings in such circumstances unless they are clearly erroneous. Ind. Trial Rule 52(A). Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. In re Marriage of Tearman (1993), Ind.App., 617 N.E.2d 974, 976. To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility. Id .

I

The Newmans argue first that the trial court erred in permitting the WCDSS to withhold consent to the adoption. Specifically, the Newmans contend that the consent of the WCDSS was unnecessary for the adoption to proceed because the WCDSS failed to respond in writing to the Newmans' request for consent within sixty days, as required by I.C. § 31-3-1-6(i)(6). In the alternative, the Newmans argue that the WCDSS unreasonably withheld its consent.

Under I.C. § 31-3-1-6(a), the prospective adoptive parents must establish the written consent of all applicable parties listed in the statute. In this case, the applicable subsection is the following:

"(a) Except as otherwise provided in this section, a petition to adopt a child under eighteen (18) years of age may be granted only if written consent to adoption has been executed by:

* * * * *

(3) Any person, agency, or county department of public welfare having lawful custody of the child whose adoption is being sought." I.C. § 31-3-1-6(a)(3).

As the WCDSS had lawful custody of L.C., it was incumbent upon the Newmans to obtain the WCDSS's consent to the adoption. 3 This the Newmans failed to do, seeking instead to adopt L.C. without the consent of the WCDSS. Under I.C. § 31-3-1-6(i), consent to an adoption is not required from a

"legal guardian or lawful custodian of the person to be adopted who has failed to respond in writing to a request for consent for a period of sixty (60) days or who, after examination of the written reasons for withholding consent, is found by the court not to be in the best interests of the child." I.C. 5 31-3-1-6(i)(6).

The first part of this subsection unambiguously provides that in order to adopt a child without consent, the petitioner must show that the legal guardian or lawful custodian failed to respond within sixty days to a request for consent. The second part is ambiguous in that it appears to require the petitioner to show that the legal guardian or lawful custodian itself is not in the best interests of the child. We find it logical to interpret this subsection as requiring the petitioner to show that the legal guardian or lawful custodian is not acting in the best interests of the child in withholding consent, based upon an examination of the written reasons for withholding consent. 4

As to the first part of this test, the record shows that the Newmans wrote to Reidl on December 7, 1993, stating that they were "fully prepared to adopt [L.C.]

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3 We note that the Placement Agreement signed by the Newmans provided, in pertinent part, that the Newmans would not "begin court proceedings for the adoption without the approval of the Department of Social Services" and that "the Department of Social Services has the right to remove the child at any time prior to adoption should the Department of Social Services consider it to be in the child's best interest." Record, p. 185.

immediately" and to the WCDSS on December 15, 1993, stating that they wanted "to adopt [L.C.] immediately" and wished "to begin adoption proceedings immediately." Record, pp. 1231, 835. On January 13, 1994, the WCDSS faxed a letter to Reidl stating that it would require a complete psycho-social assessment before it would give its consent to the adoption. Reidl met with the Newmans on that date and discussed the letter with them. The Newmans received a copy of the letter four or five days later.

The WCDSS argues that even if the statements in the Newmans' letters could be regarded as requests for consent, which it disputes, the Newmans' receipt of its letter satisfied the requirement. We agree. Indeed, the WCDSS's letter to Reidl treats the Newmans' letters as if they were requests for consent, setting forth clearly what the WCDSS will require before "giving it's [sic] consent for the adoption of [L.C.] by the

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4 The wording of the predecessor to this subsection was also problematic; it was termed "awkward and confusing" by Judge Garrard of this court. In re Adoption of M.J.C. (1992), Ind.App., 590 N.E.2d 1095, 1100. The previous version provided that consent was not required of any legal guardian or lawful custodian "who, after examination of his written reasons for withholding consent, is found by the court to be unreasonably withholding his consent." I.C. § 313-1-6(g)(6) (Burns 1987).

We also note that contrary to the Newmans' assertion, the present version of this subsection took effect on March 18, 1994, pursuant to P.L. 1-1994, Sec. 143.

Newmans." Record, p. 1291. We find that the receipt of this letter by the Newmans is sufficient to satisfy the statutory requirement. As to the second part of the test, the Newmans had the burden of showing that the WCDSS was not acting in L.C.'s best interests in withholding consent, based upon its reasons for withholding consent to the adoption. This is a heavy burden in light of the implicit presumption in I.C. § 31-3-1-6(i)(6) that the legal guardian is acting in the child's best interests, and it is a burden the Newmans have not met.

The WCDSS filed its written reasons for withholding consent to adoption with the trial court on June 1, 1994, and supported those reasons with evidence at trial. The WCDSS established that the Newmans were unable adequately to deal with the physical and mental afflictions suffered by L.C.'S brothers after having agreed to adopt the three siblings as a group, forcing the WCDSS to remove the boys at short notice. The Newmans ignored the WCDSS's request that they continue to give the boys medication that had been prescribed for them by a Maryland psychiatrist. The Newmans employed questionable disciplinary techniques in that R.C. was denied breakfast as punishment for wetting his bed. The Newmans were uncooperative in the WCDSS's efforts to arrange for a psychological evaluation for them and L.C. prior to consenting to the adoption. The Newmans' use of publicity in their effort to adopt L.C. negatively affected all three children.

As noted above, we may not reverse the trial court's findings unless they are clearly erroneous, looking

only at the evidence most favorable to the judgment. The trial court's finding that the WCDSS did not unreasonably withhold its consent is supported by the evidence and not clearly erroneous.

The trial court did not err in permitting the WCDSS to withhold consent to the adoption.

II

The Newmans next argue that the trial court erred in determining that the adoption was not in L.C.'s best interests when a welfare report had not been filed with the trial court. Specifically, the Newmans argue that a welfare report is a statutory prerequisite to a determination of an adoption petition.

The Newmans are correct in that no welfare report appears to have been filed with the court. Under I.C. § 31-3-1-4, a welfare report must be filed with the trial court in all adoption proceedings. I.C. § 31-3-1-4(d). However, where the proceedings are contested, the report may not be considered by the trial court. Matter of Adoption of Thomas (1982), Ind.App., 431 N.E.2d 506, 510 n.5. The reason for this rule was stated by the Indiana Supreme Court as follows:

"To interpret this statute as allowing said report . . . to be used as evidence in a contested case, under the guise of being an official report authorized by state to be used as evidence, would result in an unfair trial. The report contemplated by this statute might well include 'gossip, bias, prejudice, trends of hostile neighborhood feelings, the hopes and fears of social workers,' as well as hearsay and opinion."

Attkisson v. Usrey (1946), 224 Ind. 155, 160, 65 N.E.2d 489, 491 (quoting People v. Lewis (1932), 260 N.Y. 171, 183 N.E. 353, 355).

Thus, even had the report been filed, the trial court could not have considered it in making its determination on the Newmans' petition to adopt. "[W]hen a trial court's error does not substantially prejudice a party[,] reversal is not warranted." In re Marriage of Sloss (1988), Ind.App., 526 N.E.2d 1036, 1041. Any error in the failure to file the welfare report must be regarded, therefore, as harmless.

III

The Newmans argue that the trial court erred in determining that the adoption was not in L.C.'s best interests after determining that consent was not being unreasonably withheld by the WCDSS. Specifically, the Newmans contend that a court may not apply the "best interests" test until one of the statutory grounds for dispensing with consent has been proved. We disagree.

Under I.C. § 31-3-1-6(i)(6), even where the sixty-day deadline for a response has been met and consent has been refused, a court may grant a petition to adopt without the consent of the legal guardian if the legal guardian is found by the court not to be acting "in the best interests of the child," as discussed above. The "best interests" test is implicated, therefore, in a determination of whether the guardian's consent is required.

In addition, under I.C. § 31-3-1-6.3, the court must dismiss a petition to adopt if the person who files the petition to contest the adoption has established that "it is in the best interest of the child that the petition to contest the adoption be granted." I.C. § 31-3-1-6.3(c)(1)(A). Thus, even if consent has been given or waived, where a person filing a petition to contest the adoption can show that the adoption is not in the child's best interests, the petition to adopt will be dismissed. Clearly, the court's finding that the WCDSS's consent was not unreasonably withheld does not preclude finding that the adoption was not in L.C.'s best interests.

IV

The Newmans argue next that the trial court erred in quashing the Newmans' subpoena of L.C. to testify at the adoption hearing. Specifically, the Newmans contend that the trial court denied them the right to examine L.C. under oath and present her testimony as to her wishes.

In Newton v. Yates (1976), 170 Ind.App. 486, 353 N.E.2d 485, this court dealt with the question of the court's authority to quash a subpoena for attendance at a hearing for the first, and apparently the last, time. The court stated:

"Having found no definitive authority for the quashing of a subpoena ad testificandum and being provided with none by counsel for any of the parties, this issue must be treated as one of first impression in this state.

Farm Bureau argues that T.R. 45(B) provides authority for a trial court to quash a witness subpoena. That rule however, deals with subpoena duces tecum and has no applicability to subpoenas ad testificandum.

The reasons for the granting [of] a motion to quash the subpoenas appears [sic] to be immateriality, irrelevancy, and inadmissibility. These, in essence, were the only grounds placed before the trial court by Farm Bureau.

Here . . . both [witnesses] probably possess some relevant and admissible evidence to offer at trial. . . .

The procedure for separating admissible from inadmissible testimony must not be the quashing of all testimony.

For the above reason, we find it necessary to reverse for the quashing of the subpoena ad testificandum. We are further reinforced in our decision by the fact that these same witnesses were protected from deposition by the trial court. In effect, any knowledge of the physical evidence which they may possess has been barred from Newton."

Id. at 493-94. Thus, we may glean from the court's opinion in Newton that the quashing of a subpoena ad testificandum is improper where a witness potentially possesses some relevant and admissible evidence to offer at trial.

In the present case, the threshold issue at trial was whether the WCDSS was acting in L.C.'s best interests

in withholding consent, based upon its reasons for withholding consent to the adoption. Upon an examination of the record, we conclude that the testimony of L.C. would have been irrelevant to a determination of this issue. All of the reasons for withholding consent set forth by the WCDSS related to the Newmans' failure to cooperate with the WCDSS or to the Newmans' failure adequately to care for L.C.'s siblings. The testimony of L.C. as to her wish to be adopted by the Newmans would have been irrelevant to the court's determination of whether the WCDSS's reasons for withholding consent showed it to be acting in her best interests. The court did not err in quashing the subpoena.

V

The Newmans argue next that the trial court erred in failing sua sponte to appoint a guardian ad litem to represent L.C. at the adoption hearing. Specifically, the Newmans contend that the trial court was required to appoint independent legal representation to protect L.C.'s interests.

Under I.C. § 29-3-2-3(a), the court must appoint a guardian ad litem to represent the interests of a minor "if the court determines that the . . . minor is not represented or is not adequately represented by counsel." Indiana T.R. 17(C) provides, similarly, that "[i]f an infant . . . is not represented, or is not adequately represented, the court shall appoint a guardian ad litem for him . . . ." T.R. 17(C). Under these rules, a trial judge need only appoint a guardian ad litem if he believes the minor is not otherwise

adequately represented. Crayne v. M.K.R.L. (1980), Ind.App., 413 N.E.2d 311, 313.

In the present case, while the interests of L.C. were certainly affected by the outcome of the trial, the appointment of a guardian ad litem for L.C. could have had no bearing on the court's determination of whether the WCDSS had improperly withheld consent to the adoption. Thus, there was no apparent necessity for such an appointment. No evidence was presented, moreover, to indicate that the WCDSS and the Newmans were acting adversely to L.C.'s interests. In addition, we note that the court heard testimony from L.C.'s Maryland court-appointed attorney, who, although not representing L.C. in this proceeding, testified that her role was

"to represent to the Court [sic] and any tribunal where [L.C.]'s interest is at stake, what I perceived to be in her best interest, based upon my own independent investigation of facts and my own professional responsibility to the client."

Record, p. 399.

The court did not abuse its discretion by not appointing a guardian ad litem for L.C.

VI

The Newmans argue next that the trial court erred by qualifying three witnesses of the WCDSS as experts and permitting them to give expert opinion testimony. The Newmans contend that none of the

three witnesses had the qualifications to be deemed experts.

Under Ind. Evidence Rule 702,

"[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Ind. Evid. Rule 702(a). "The determination of whether a tendered witness is qualified to give an opinion as an expert is a matter lying within the sound discretion of the trial court." Matter of Adoption of Lockmondy (1976), 168 Ind.App. 563, 343 N.E.2d 793, 795. An expert may be qualified by practical experience as well as by formal training. Head v. Comm'r. Indiana Dept. of Env. Mgmt. (1993), Ind.App., 626 N.E.2d 518, 526. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Myers v. Myers (1990), Ind., 560 N.E.2d 39, 42.

In the present case, the three witnesses qualified as experts by the court each testified to their professional qualifications and to their knowledge of the specific case. Ann Turner testified that she had been a licensed social worker for ten years, had been qualified as an expert hundreds of times in the Maryland courts, and was personally involved in the

Newman case. Patricia Reidl testified that she possesses a master's degree in social work, that she is a state-certified social worker, that she had been employed by The Children's Bureau for twenty-five years, and that she was currently the Adoptions Program Supervisor. Reidl also testified regarding her numerous personal contacts with the Newmans. Franzella Starkey, L.C.'s Maryland court-appointed attorney, testified that she had been chief attorney for the Legal Aid Bureau in Salisbury, Maryland, for ten years and that she had attended numerous training programs in child welfare. Starkey testified that her personal contacts with L.C. and her siblings began in July, 1991, and that she had represented all three children in various proceedings.

Among their complaints, the Newmans argue that these witnesses have no advanced degrees, no special professional recognitions, and no special accomplishments. The Newmans also argue that the opinions of Turner and Starkey are based on hearsay because neither Turner nor Starkey had first-hand knowledge of the Newman home or L.C.'s circumstances there. As to the first argument, no such advanced degrees or special recognitions or accomplishments are necessary to qualify as an expert. As to the second, the Newmans point us to no specific hearsay testimony in the record that the trial court erred in admitting, and, in any event, under Indiana Rule of Evidence 703, an expert may give an opinion based upon hearsay or otherwise inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.

The Newmans have failed to demonstrate that the trial court abused its discretion in qualifying these witnesses as experts.

VII

The Newmans argue next that the trial court erred in failing to grant the Newmans' verified request for change of judge, which was filed May 19, 1994, and denied by Judge Deiter on May 20, 1994. The Newmans contend that Judge Deiter was biased and prejudiced against them, basing this contention on a series of rulings adverse to the Newmans and on the forcible removal of L.C. from the Newmans' home.

On May 12, 1994, the trial court issued an order granting full faith and credit to the March 22, 1994 order of the Circuit Court of Worcester County, Maryland, that L.C. be removed from the Newmans' home and returned to Maryland. The Newmans allege that Judge Deiter's refusal to stay this order until the adoption trial, which was scheduled for June 6, 1994, demonstrates his bias and prejudice. We disagree.

As the Newmans acknowledge, a party moving for a change of judge must establish actual personal bias against that party. Smith v. State (1989), Ind., 535 N.E.2d 1155, 1157. The mere fact that a court issues rulings unfavorable to a party does not establish that the court had actual personal bias against that party. Cook v. State (1993), Ind.App., 612 N.E.2d 1085, 1088.

The Newmans argue that there was no "rational reason" for Judge Deiter to order the removal of L.C. when the adoption hearing was just days away other than bias and prejudice. This argument is meritless. A movant for a change of judge must affirmatively show actual personal bias; an allegation that no rational reason exists for a judge's ruling is not a demonstration of bias or prejudice.

The forcible removal of L.C. from the Newmans' home took place on May 27, 1994, one week after Judge Deiter's ruling on the Newmans' request for change of judge. This event could not have formed the basis of the Newmans' request and could not have entered into the judge's decision-making process in denying the request.

The trial court did not abuse its discretion in denying the Newmans' verified request for change of judge.

Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

BARTEAU, J. and RUCKER, J. CONCUR

APPENDIX B

217 STATE HOUSE
INDIANAPOLIS, IN 46204

H. JOHN OKESON
CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

(317) 232-1930
FAX (317) 232-8365

Cause Number
49A02-9409-CV-00548
Lower Court Number:
49D089404AD126

CLEM, LAURA GAIL RACHEL: IN RE THE MATTER OF THE ADOPTION

You are hereby notified that the COURT OF APPEALS has an this day 7/12/95
APPELLANTS PETITION FOR REHEARING DENIED.
JOHN T. SHARPNACK, CHIEF JUDGE

WITNESS my name and the seal of said Court,
this 12th day of July, 1995

H. John Okeson
Clerk Supreme Court, Court of Appeals and Tax Court

APPENDIX C

217 STATE HOUSE
INDIANAPOLIS, IN 46204

H. JOHN OKESON
CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

(317) 232-1930
FAX (317) 232-8365

49A02-9409-CV-00548 Lower Court Number: 49D089404AD126

CLEM, LAURA GAIL RACHEL: IN RE THE MATTER OF THE ADOPTION

You are hereby notified that the SUPREME COURT has on this day 11/29/95
APPELLANT'S PETITION FOR TRANSFER IS HEREBY DENIED.
RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR, EXCEPT DICKSON, J. WHO VOTES TO GRANT TRANSFER.

WITNESS my name and the seal of said Court,
this 29th day of November, 1995

H. John Okeson
Clerk Supreme Court, Court of Appeals and Tax Court

APPENDIX D

STATE OF INDIANA	IN THE MARION SUPERIOR COURT, PROBATEDIVISION
COUNTY OF MARION	CAUSE NO. 49D08-9404-AD126

IN THE MATTER OF
THE ADOPTION OF
LAURA GAIL RACHEL CLEM

ORDER DISMISSING PETITION FOR ADOPTION

On June 2, 1994, the petitioners, Lawrence Todd Newman and Beverly Rochelle Newman, appeared in person and by their attorney, Russell L. Jones and Lawrence Todd Newman. The Department of Social Services of Worcester County, Maryland (the Department) appeared by its caseworker, Anne Turner, and by its attorney, Michael P. Bishop. Evidence was heard on the Department's Motion to Contest Adoption and the Court, having taken the matter under advisement, finds that:

1. The Petition for Adoption was filed on April 13, 1994.

2. The Department filed a timely Motion to Contest Adoption on April 22, 1994, as required by IC 31-3-1-6.3(a).

3. The Department filed timely written reasons for withholding consent to adoption on June 1, 1994, as required by IC 31-3-1-6(i)(6).

4. The Department is the court-appointed guardian of Laura Gail Rachel Clem and has been empowered by the appointing court to consent to the adoption.

5. The Department has not consented to the adoption.

6. A decree of adoption may be entered only if the required consents are obtained. Taylor v. White (1988), 520 N.E.2d 475.

7. The consent of the Department is required by IC 31-3-1-6(a)(3) unless the Department is found by the Court to be unreasonably withholding its consent. IC 31-3-1-6(i)(6); In Re Adoption of M.J.C. (1992) 590 N.E.2d 1095.

8. The Department is not unreasonably withholding its consent.

9. The consent of the Department is required and has not been obtained by the petitioners.

10. The adoption would not be in the best interests of Laura Gail Rachel Clem.

11. Dismissal of the Petition for Adoption would be in the best interests of Laura Gail Rachel Clem.

IT IS THEREFORE ORDERED that the Petition for Adoption filed by Lawrence Todd Newman and Beverly Rochelle Newman is dismissed.

Date June 7, 1994

CHARLES J. DEITER, JUDGE

APPENDIX E

STATE OF INDIANA — IN THE MARION SUPERIOR COURT,PROBATE DIVISION

COUNTY OF MARION — CAUSE NO. 49D08-9403-AD-000095

IN THE MATTER OF
THE ADOPTION OF
LAURA GAIL RACHEL CLEM

ORDER TO ENFORCE FOREIGN ORDER FOR CHANGE OF PLACEMENT

1. Laura Gail Rachel Clem was born on December 23, 1989.

2. On February 12, 1993, in Cause No. 689A, the Circuit Court for Worcester County, Maryland, appointed the Department guardian of Laura Gail Rachel Clem, with the right to consent to adoption.

3. On or about March 29, 1993, the child was placed in the home of Lawrence T. Newman and Beverly R. Newman for the purpose of adoption after a supervisory period of at least six (6) months.

4. On March 22, 1994, in the same guardianship proceeding, the Court ordered:
...that the Respondent, Laura Gail Rachel Clem, be, forthwith, removed from the adoptive home and returned to the custody of the Worcester County, Maryland, Department of Social Services...

5. The order was requested by the Department of Social Services for Worcester County, Maryland, in its Motion for Change of Placement.

6. The Legal Aid Bureau, Inc. of Maryland, counsel of record for Laura Gail Rachel Clem, consented to the entry of the order of March 22, 1994.

7. Lawrence T. Newman and Beverly R. Newman had no prior notice of the Motion for Change of Placement or of the resulting order.

8. At all times since February 12, 1993, the Circuit Court for Worcester County, Maryland, has had, and continues to have, subject matter and in personam jurisdiction over Laura Gail Rachel Clem.

9. At the time it entered its order on March 22, 1994, the Circuit Court for Worcester County, Maryland, had not acquired in personam jurisdiction over Lawrence T. Newman and Beverly R. Newman.

10. The order is enforceable without in personam jurisdiction over Mr. and Mrs. Newman because Maryland law does not afford foster parents the right to notice or hearing prior to removal of a child from their home.

11. This Court is required by Article 4, Section 1 of the Constitution of the United States to give full faith and credit to the order of the Circuit Court of Worcester County, Maryland.

IT IS THEREFORE ORDERED that Lawrence T. Newman and Beverly R. Newman, no later than Friday, May 20, 1994, at 4:00 P.M., return custody of Laura Gail Rachel Clem to the Department of Social Services for Worcester County, Maryland, its agent or its designee.

DATED this 12th day of May, 1994.

CHARLES J. DEITER, JUDGE